**NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT AND OF HIS OR HER CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009.**

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**
**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2017-404-1012**
**[2018] NZHC 514**

| | |
|---|---|
| UNDER | the Immigration Act 2009, ss 129-131, s 140 |
| IN THE MATTER | of an appeal of a decision of the Refugee Status branch to decline an application for refugee status |
| BETWEEN | WK<br>Applicant |
| AND | THE REFUGEE PROTECTION OFFICER, MBIE, AUCKLAND<br>Respondent |

Hearing: 11 October 2017

Appearances: Applicant in person (with McKenzie friend B Johnson)
S Jerebine and T Burgess for Respondent

Judgment: 23 March 2018

---

**JUDGMENT OF WOODHOUSE J**

---

*This judgment was delivered by me on 23 March 2018 at 11:00 a.m. pursuant to r 11.5 of the High Court Rules 2016.*

*Registrar/Deputy Registrar*

……

Parties / Solicitors:
The Applicant
Ms S Jerebine and Ms T Burgess, Crown Law Office, Wellington

[1] This is a proceeding for judicial review of a decision of a Refugee and Protection Officer (RPO). The RPO refused to consider what was the fourth claim by the applicant, WK, for recognition as a refugee and protected person under the Immigration Act 2009 (the Act).

## Introduction

[2] WK is a Turkish national. He came to New Zealand in 2011 from Turkey.

[3] Since 2012 WK has made four unsuccessful claims under the Act for refugee and protected person status. On the fourth claim, now under review, the RPO, applying s 140(3) of the Act, concluded that the claim was, in different parts, manifestly unfounded, clearly abusive, and repeated claims previously made. On those findings he exercised his discretion under s 140(3) to refuse to consider the claim.

[4] Section 140 provides:

> **140 Limitation on subsequent claims**
>
> (1) A refugee and protection officer must not consider a subsequent claim for recognition as a refugee [or a protected person] unless the officer is satisfied—
>
> (a) that there has been a significant change in circumstances material to the claim since the previous claim was determined; and
>
> (b) the change in 1 or more of the circumstances was not brought about by the claimant—
>
> (i) acting otherwise than in good faith; and
>
> (ii) for a purpose of creating grounds for recognition under any of sections 129 to 131.
>
> (2) For the purposes of determining the matter in subsection (1), the refugee and protection officer must not treat the actions of any other person in relation to the claim or the claimant as a mitigating factor.
>
> (3) A refugee and protection officer may refuse to consider a subsequent claim for recognition as a refugee or a protected person if the officer is satisfied that the claim—

(a) is manifestly unfounded or clearly abusive; or

(b) repeats any claim previously made (including a subsequent claim).

[5] The principal issues may be summarised, in broad terms, as follows:

(a) Did the RPO misapply or misinterpret s 140 of the Act?

(b) Was the RPO's decision unreasonable?

(c) Was the process leading to the decision procedurally unfair?

[6] WK, in a formal sense, represented himself in this proceeding. However, he had substantial support in preparing his claim and submissions from Mr Brian Johnson and Mr David Lewis who, I apprehend, are not lawyers but have knowledge and experience in relation to immigration applications and the relevant law. Leave was granted for Mr Johnson to act as a McKenzie Friend in court for WK. This support has been of assistance to me in understanding WK's case.

**Procedural history: the first three claims and appeals**

***The first claim***

[7] WK's first claim was lodged on 9 January 2012. He was represented by Mr Davoud Mansouri-Rad. WK was interviewed on 10 February 2012.

[8] The basis of the claim was that WK would face a risk of harm in returning to Turkey, due to his belief in Christianity. WK argued he would be harmed by family members who are Muslims and persecuted by state agents if he returned to Turkey.

[9] The first application was declined in a decision released on 13 April 2012. The RPO found WK to be credible. She accepted WK had faced pressure from his family and harassment when he was in the army, and had been subject to possible discrimination from the police following his conversion to Christianity. But she considered WK's risk of harm was "speculative or remote" and "did not rise to the level of persecution". She found "no evidence of sustained and systemic denial of

the core human rights of Christians and Christian converts" and considered WK could "continue to practice his religion in Turkey in the future". On these findings she held WK did not meet the threshold for refugee or protected person status.

[10] WK appealed against the decision to the Immigration and Protection Tribunal (the Tribunal). Mr Mansouri-Rad continued to act for WK. The appeal was dismissed in a decision dated 19 July 2013.[1] Unlike the RPO, the Tribunal considered that some aspects of WK's claim (particularly that his uncle would organise to have him killed) were not credible. The Tribunal considered that aspects of the evidence contradicted WK's claims. Regarding the legal, social and political situation in Turkey, the Tribunal found the "picture is … mixed and there is space within Turkish society for individuals to adopt, practice and manifest the religion of their choice".[2] It considered there was a risk of WK facing discrimination in employment, but it did not meet the threshold of "persecution". At most, WK could point to being discriminated against for promotions, rather than employment itself. WK did not seek to challenge the Tribunal's decision.

***The second claim***

[11] WK's second claim was lodged on 8 October 2013, approximately 12 weeks after delivery of the Tribunal's decision on the first claim. He was interviewed on 8 November 2013. He was not represented at that time, but he filed written submissions in support of his claim and was interviewed by the RPO. He claimed a fear of returning to Turkey because he wanted to be a Christian pastor and because he had made "anti-nationalist" comments on Facebook. He stated that his mother had told him he was wanted by Turkish police for questioning and possible detainment.

[12] The RPO declined the claim on 14 February 2014. In applying s 140 of the Act, as required, he found that there was "a new element to the claim, [namely WK's] comments on Facebook and the police visiting his parents". But the RPO did not accept there was a credible link between WK's Facebook comments and the visits from Turkish police. He further found that the large numbers of people

---

1 *AE (Turkey)* [2013] NZIPT 800344.
2 At [94].

making similar posts, and "the corresponding limited number of prosecutions for this and blasphemy", suggested that WK did not face a risk of harm for his online comments. The RPO considered that the evidence did not establish any appreciable worsening of conditions for Christians since WK's first application. There was thus no risk of serious harm.

[13] WK appealed to the Tribunal. There was a hearing in December 2015 at which WK was represented by two counsel. The appeal was dismissed in a decision delivered on 14 January 2016.[3]

[14] The Tribunal elaborated on some factual aspects of WK's claim, including that he had become a member of the Church of Jesus Christ of the Latter-Day Saints after his first appeal. It found that WK's conversion to Mormonism reflected a new ideal that included a desire to share his faith.

[15] The Tribunal received extensive material and submissions, and recorded a detailed account of the treatment of religion and political viewpoints in Turkey. It rejected WK's claims that the Mormon Church was unable to operate in Turkey. It held that, although the likelihood of WK's proselytising in Turkey had increased, it was "speculative" that this would result in risk of serious harm to him. The Tribunal was unable to conclude that WK would face persecution because of his religious practices. Nor did it consider his online comments created such risks, or that he was likely to be re-enlisted in the Turkish army, or face serious threat from the Islamic State.

***Humanitarian appeal***

[16] WK also appealed to the Tribunal on humanitarian grounds against liability for deportation.[4] This further appeal was dismissed in a decision delivered on 14 March 2016.[5]

---

3 *AN (Turkey)* [2016] NZIPT 800664.
4 Immigration Act 2009, ss 194(5) and (2) and 207.
5 *[WK]* [2016] NZIPT 501784.

[17] WK claimed alcohol abuse and related mental health issues, along with his conversion to Mormonism, constituted exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for him to be deported to Turkey.

[18] The Tribunal rejected WK's claims of being at risk of harm if he returned to Turkey, for reasons similar to its reasons for rejecting his appeal against the RPO's decision. It focused on his mental health, alcoholism and what it accepted was his "vulnerable personality". The Tribunal accepted that leaving New Zealand would be "unsettling" for WK, but held that there was no evidence that WK could not avail himself of health services in Turkey. It concluded that these personal circumstances, and WK's membership of the Mormon Church, did not reach the threshold of exceptional circumstances of a humanitarian nature.

***The third claim***

[19] WK's third claim was lodged on 1 April 2016. He was interviewed on 17 May 2016. He was represented by Ms Iona Uca.

[20] WK argued that he would be at risk of harm if he returned to Turkey because of his bisexuality or homosexuality (WK referred to both sexualities without appearing to distinguish them). In written submissions presented to the RPO, Ms Uca was cognisant of the need to satisfy the RPO that the claim was not simply repetitive and that the RPO had jurisdiction to hear it under s 140 of the Act. The focus was on WK's sexuality and an increase in the risk of harm to political dissidents in Turkey following the attempted coup d'état on 15 July 2016.

[21] The RPO dismissed the claim in a decision dated 18 August 2016. He rejected an argument that evidence of WK's "going public" about his sexuality in New Zealand was a new circumstance for the purpose of bringing a subsequent application. He found that the "core circumstances [WK] addresses as relevant to his fear of returning to Turkey were more significantly manifest *prior* to his first claim to refugee status". He therefore rejected that WK's sexuality was a circumstance providing the RPO jurisdiction to consider WK's claim.

[22] Regarding the attempted coup d'état in Turkey, the RPO summarised evidence, from a range of media reports, of the nature of the Turkish Government's actions after the coup was quashed and the reports of, and condemnation from, international agencies such as Amnesty International and Human Rights Watch. This included reference to a report from Amnesty International expressing concern that the Turkish Government had engaged in torture and that there was credible evidence that detainees in Turkey were being subjected to beatings, rape and torture in official and unofficial detention centres in Turkey.

[23] Following that summary, the RPO began his assessment with the following observations and findings, which were central to his decision to dismiss the claim founded on these events:

> In respect to the jurisdictional question, while the attempted coup might in itself constitute a significant chance [sic] in circumstances, no clear evidence has been provided indicating that it is material to [WK's] claim.
>
> [WK's] evidence at interview was that he held firm pro-communist or anarchist political views and he would engage with leftist and pro-Kurdish political parties if he returned to Turkey. [WK] had provided evidence in his previous claims that he was active on Facebook and an online website using a pseudonym. This aspect of [WK's] claim must itself be contextualised against the fact that [WK] has provided no evidence of previous engagement in political parties or organisations. Also, given his stated anti-social disposition, it also seems highly unlikely that he would actively engage in any political organisation.
>
> While it is accepted that [WK] holds genuine political views in opposition to the government, and put these forward as an element in his basis of claim, it has previously been found by the Tribunal that these views would not put him at risk of serious harm in Turkey. Section 141(2) of the Immigration Act 2009 entitles the RPO to rely on these findings.
>
> While it is acknowledged that the internal situation is not without its challenges, previously cited country information does not indicate that [WK] belongs to any of the main groups identified in the current purge of suspected Gulenist sympathisers; [WK] has not provided any evidence that he has had any association with the judiciary, teaching, media, or been active in the armed services since 2005. It is noted that [WK] is without a profile in Turkey.
>
> (footnote omitted)

[24] The RPO concluded that there was no indication that the Turkish Government's reaction to the attempted coup d'état constituted a significant change

in circumstances material to WK's claim since the previous claim had been determined.

[25] WK again appealed to the Tribunal. He was represented at the hearing on 17 January 2017 by Ms Uca. A decision was delivered on 27 February 2017.[6]

[26] The Tribunal noted that the claim presented by WK on the appeal was "materially different" from the claim determined by the RPO. This included, in particular, a claim of risk arising from online statements by WK against the Turkish Government and against Islam, in a blog and on Twitter, after the RPO's decision had been delivered. The Tribunal recorded the background to this new claim in some detail and, in particular, relevant evidence of steps taken by Turkish authorities after, as well as before, the RPO decision of 18 August 2016. This included evidence of Turkish Government responses to anti-Government and anti-Islam statements on social media.

[27] Pursuant to s 200(1)(a) of the Act, the Tribunal assessed this information and concluded that there had been a significant change in circumstances material to WK's claim since the previous claim had been determined. Under s 200(1)(b) the Tribunal then assessed a question whether the change in circumstances was brought about by the appellant acting "otherwise than in good faith". It concluded that WK had not begun or continued the commentary on social media in bad faith and for the purpose of creating grounds for recognition.

[28] Following those conclusions, and some negative credibility findings against WK (which do not need to be summarised), the Tribunal identified four aspects of WK's claim, as advanced to the Tribunal, which required consideration in order to make substantive assessments of the claim to refugee and protected person status. Two were WK's sexual orientation and a claim based on loss of his Turkish identity card. The Tribunal found against WK on those matters, but the findings do not require consideration for the purposes of this judicial review proceeding.

---

6 *AW (Turkey)* [2017] NZIPT 801067.

[29] The two matters that remain relevant are WK's association in Turkey with an American pastor (the pastor), and WK's blog and Twitter activities.

*WK's association with the pastor*

[30] WK had been baptised, in 2001 in Turkey, by the pastor. The pastor was arrested in Turkey following the attempted coup. The Tribunal recorded that he was brought before a court "in connection with a charge of membership in an armed terrorist organisation". There were allegations that the pastor had links with the organisation the Turkish Government alleged had instigated the attempted coup. At the date of the Tribunal's decision he was still in custody. The Tribunal recorded WK's fear that his name would come to light when the pastor's documents and computer were examined and that, because of WK's association with the pastor's church, and WK's participation in missionary activities, WK would be at risk if he returned to Turkey.[7]

[31] The evidence of WK's association, in addition to being baptised in 2001, was that he had attended the pastor's church between 2001 and 2003 and, over this period, he had joined the pastor in missionary work on two or three occasions. WK's evidence was that he visited the church in 2011 because he wanted to say goodbye to the pastor and he got a text from him when he was at the airport. WK had no further contact with the pastor after 2011.

[32] The Tribunal's conclusion on this ground of appeal was as follows:

> [81] While it has been accepted that [the pastor] has been arrested and remains in detention, there is nothing before the Tribunal to establish that persons such as the appellant, who only had a low-level association with him and who ceased attending his church some fourteen years previously, would be of any interest to the Turkish authorities or that a former association with [the pastor] would give rise to security or investigation of the appellant either at the airport or elsewhere. There is no country information before the Tribunal to establish that persons with a limited, historical connection with [the pastor] are being investigated, let alone arrested or detained. The appellant's claims in this regard are entirely speculative and are rejected. The Tribunal is not satisfied that the appellant's association with [the pastor] gives rise to a real chance that, in Turkey, he will face a breach of his human rights which will result in serious harm to him. He has rejected the Christian

---

7 At [44].

> faith and has no intention of resuming attendance at [the pastor's] church or any other church for that matter.

*WK's blog and Twitter activities*

[33] WK gave evidence to the Tribunal that, although he had no followers on Twitter, between 14 and 32 people had read blog posts he had made. The Tribunal set out in some detail, and reviewed, evidence it accepted of restrictions on freedom of expression in Turkey since the attempted coup in July 2016.[8] This included evidence of more than 10,000 Turks being investigated for online comments, of whom 1,656 were arrested. The Tribunal noted several cases mentioned in a Freedom House Report, "Freedom on the Net 2016 – Turkey", where Turks were given suspended sentences, or held in prison for short periods, for expressing various forms of political dissent online.

[34] The Tribunal nevertheless concluded that WK's social media profile did "not give rise to a well-founded fear of being persecuted". The principal reasons were as follows:

> [91] There is no country information establishing that Turkish citizens returning to their country are screened regarding their social media activity. The appellant has a profile on social media that could at best be described as minimal. Given the statistics referred to above concerning the number of arrests and prosecutions for social media activity, the chance of the appellant being investigated or arrested by the authorities as a result of his social media postings insulting President Erdogan and Islam does not rise to the level of a real chance. Even should this occur, the Tribunal does not consider the consequences that would follow constitute serious harm. As noted earlier, the Tribunal is aware of two recent convictions for insulting President Erdogan on social media (apart from a third one which was associated with the promotion of a terrorist organisation). Both of these convictions resulted in suspended sentences.

***The fourth claim: the decision under review***

[35] WK's fourth claim, leading to the decision under review, was lodged on 21 March 2017 by his lawyer, Ms Uca. There was the formal application, using Immigration New Zealand's standard form, a detailed typewritten statement from WK, to which were attached copies of documents referred to in the statement (eight annexures in Turkish with English translations), and a covering letter from WK's

---

8 At [84]-[91].

solicitors, signed by Ms Uca. Ms Uca also forwarded to the Refugee Status Branch of Immigration New Zealand a copy of an email she received from WK on 8 March 2017 and a copy of her response on the same date.[9]

[36] The RPO who made the subsequent decision, wrote directly to WK, by letter dated 31 March 2017. He stated that he "considered there may be grounds to refuse to consider your subsequent claim" because the threshold in s 140 of the Act was not reached. After outlining the four claims made by WK since 2012, the RPO explained why he considered that there might be grounds to refuse to consider the fourth claim under s 140(3) of the Act. As part of this explanation the RPO summarised the provisions in s 140(4). Reference was made to relevant parts of the third Tribunal decision. WK was invited to make any submissions in writing within 10 working days.

[37] WK replied, in writing, within time. It is a lengthy response. Although Ms Uca had been acting and, as earlier recorded, lodged the application with supporting documents, Ms Uca had to withdraw in late March for medical reasons. It is unclear whether the RPO had been advised, although it may be inferred that he had because his letter had gone directly to WK.

[38] WK's response to the RPO sought to "clarify" his previous claims and to distinguish them from the fourth claim. He also sought to advance further submissions in support of the fourth claim. It is unnecessary to summarise the detail.

[39] The RPO's decision on the fourth claim is dated 8 May 2017 and was sent to WK, with a covering letter, on that date.

[40] In the decision, the RPO outlined each of the three previous claims and RPO and Tribunal decisions on them. He then noted three main parts to WK's fourth claim as recorded in his formal "Confirmation of Claim" and his supporting written statement, as follows:

---

[9] Relevant content of the emails is recorded in a chronology at [58] below.

(a) Since the Tribunal's third decision, WK claimed his popularity on social media had increased and WK argued that this proved that he was at risk in Turkey. He claimed that, by the date of the claim, there had been 864 views on his blog, with 105 being from Turkey. In addition, on 6 March 2017 someone had sworn at him on Twitter and on 7 March he received another abusive message on Twitter.

(b) On 10 March 2017 a former acquaintance of WK in Turkey had notified the Turkish police of WK's social media activities. In consequence, he would be arrested and imprisoned if he returned to Turkey.

(c) In addition, WK challenged the third Tribunal decision, claiming that it under-appreciated the extent of WK's political profile and under-estimated the risk he would face if he returned to Turkey.

[41] WK, in his written statement in support of the claim, and in his response to the RPO's letter of 31 March 2017, challenged a number of findings in the previous Tribunal decision. Such challenges make up a considerable part of the written submissions. These challenges were rejected by the RPO. The RPO applied s 141(2) of the Act which provides that, in a subsequent claim, a claimant may not challenge any finding of credibility or fact made by an RPO or the Tribunal in relation to a previous claim, and that the RPO determining the subsequent claim may rely on those findings.

[42] THE RPO found the claim to be "clearly abusive" for the following reasons:

> [WK] has made three previous claims for refugee and protection status. The Tribunal found that he had given false evidence in all of these claims. As noted above, his present claim was lodged less than a month after the Tribunal declined his third claim. Indeed, he completed his Confirmation of Claim only 15 days after the Tribunal's decision was made. By this time Immigration New Zealand … records also show that he had become liable for deportation.
>
> When viewed in the context of [WK's] immigration history, the RPO considers that the lodging of [WK's] present claim is simply a tactic designed to forestall the deportation process.

[43] The RPO found that WK's claim based on, or arising from, his online activities repeated claims previously made and were manifestly unfounded. He said:

> [WK's] second and third claims were partly based on his online activities and the harm he feared because of these activities. In his present claim [WK] continues to assert that his online activities will have brought him to the attention of the Turkish authorities, with the attending harm that will result. As such, [WK's] present claim repeats a 'claim previously made', as per section 140(3)(b).
>
> Moreover, the Tribunal's decision on [WK's] third claim found that his profile on social media was minimal and that given the statistics concerning arrests and prosecutions for social media activity, the chance of his being investigated or arrested by the authorities as a result of his social media postings did not rise to the level of a real chance. The Tribunal added that even should this occur the consequences that would follow would not constitute serious harm.
>
> In [WK's] present claim he states that the views to his blog have increased. However, the number of views is still small overall. As such, the Tribunal's finding that there was not a real chance of [WK] being investigated or arrested by the authorities as a result of his social media postings continues to be applicable.
>
> While [WK] also states that the Turkish police have been informed of his activities, the Tribunal found that even should he be investigated the consequences that would follow would not constitute serious harm.
>
> As such, [WK's] claim that he is at risk in Turkey because of his social media activities is considered to be a repetition of a claim previously made and "manifestly unfounded", as per section 140(3)(a).

[44] The RPO considered two "additional factors" advanced by WK in his written response. First, that he had been prejudiced by a Turkish interpreter "gossiping" about his claims for refugee and protected person status. The RPO noted this issue was raised in the second claim and determined on 14 February 2014. It was thus a repetition. Second, WK was concerned that the publication of the Tribunal's decisions on his first and second claims online could identify him and create a risk of harm in Turkey. This was rejected as "manifestly unfounded" as the risk of harm was speculative and decisions reported online were anonymised.

**Grounds of review**

[45] There are five grounds for review pleaded in the statement of claim. A sixth ground was advanced in written submissions filed before the hearing. Ms Jerebine, for the respondent, replied to those submissions and I am satisfied that this is a

further ground for review which should be considered. The grounds, in summary, are:

1. The RPO erred in law in holding that "new evidence coming to light (becoming knowable or attainable) could not be a significant change in circumstances" for the purpose of s 140(1) of the Act.

2. There was legal error in holding that there is "considerable overlap" between s 140(1) and s 140(3)(b) of the Act.

3. The RPO erred in law by holding that "the new evidence presented constituted a repetition of a previous claim" within the meaning of s 140(3)(a).

4. The RPO used mistakes by WK, arising from his being self-represented "to undermine [WK's] valid claim of new circumstances" and such was an error of law.

5. The decision is unreasonable, with the question of reasonableness to be determined by "an adequate level of scrutiny" of the merits of the decision.

6. The decision-making process was procedurally unfair because WK was self-represented and he was not interviewed by the RPO.

**Assessment**

[46] There is a degree of overlap between some of the grounds as pleaded, and as developed in WK's written and oral submissions. For this reason, and because it will assist in analysis, I will consider some of the grounds together and expand the analysis of some grounds.

[47] One broad observation is appropriately made for WK's benefit as a self-represented litigant. A substantial number of WK's submissions are in support of an argument that he is entitled to refugee or protected person status, or both. There

were submissions which, in substance, invited this Court to determine, for example, whether WK would be at serious risk if he returned to Turkey because of one or more of the matters he advanced in the claim now under review. There is no criticism of WK for advancing these matters, but it is necessary to make clear that these are not matters that can be determined in this proceeding. What has to be determined is whether there was an error by the RPO in his conclusions that s 140(3) applied, or an error in his exercise of his discretion under that provision to refuse to consider the claim. The merit of the underlying claim that WK is entitled to refugee and protected person status cannot be determined in this proceeding.

***The application of s 140(1) of the Act***

[48] The assessment under this heading is directed principally to grounds 1 and 2. Those grounds, as set out in the statement of claim, are not made out, for reasons that can be stated succinctly.

[49] In relation to ground 1, the RPO did not hold that new evidence could not be a significant change in circumstances. The RPO's decision was that the new claim should not be considered because of his conclusion under s 140(3) that the claim was manifestly unfounded, clearly abusive and repetitious of earlier claims. Whether there was error of law in those conclusions is considered under the next heading.

[50] Ground 2, as pleaded, was that there was error in "holding" that there is considerable overlap between s 140(1) and s 140(3)(b). The RPO did not reach a legal conclusion to that effect, and an observation that there is a degree of overlap between the two provisions would not give rise to reviewable error. However, the substance of WK's argument is that the RPO should have first considered the claim under s 140(1). Whether that is correct requires assessment.

[51] I am satisfied that there was no error in that regard. In *BD (India) v Refugee and Protection Officer*, Peters J rejected the same argument.[10] She said:

> [30] Counsel for BD's first submission concerned the proper construction of s 140. As I understood the submission, it was that s 140 requires an officer to assess a subsequent claim under s 140(1) before considering s 140(3).

[10] *BD (India) v Refugee and Protection Officer* [2016] NZHC 1762.

> This means an officer would have to consider whether there had been a "significant change in circumstances material to the claim since the previous claim was determined", before considering whether the claim was manifestly unfounded, clearly abusive or repetitive. Counsel submitted that, because the RPO did not consider s 140(1) first when reviewing BD's subsequent claim, the RPO erred in law and the decision was unreasonable and substantively unfair.
>
> [31] I do not accept this submission. The effect of s 140(1) is that an officer must not consider a subsequent claim unless there has been a change of the nature identified. Section 140(3), however, confers discretion on the officer to refuse to consider a claim on the ground that it is manifestly unfounded, clearly abusive or repetitive. If that discretion does not arise, or is not exercised, the subsequent claim may still, of course, be excluded from consideration by operation of s 140(1).
>
> [32] Nothing on the face of s 140 requires an officer to make a determination under s 140(1) before considering the exercise of discretion under s 140(3), and I do not consider any purpose would be served by such a requirement. ... If I were to accept counsel's submission, s 140(3) would be largely redundant.

[52] I agree with that analysis. The application for review on grounds 1 and 2, cannot succeed.

***Did the RPO err in his application of s 140(3)?***

[53] The analysis under this heading includes analysis of ground 3 – that there was an error of law in finding that the claim repeated a previous claim – and challenges to the further findings that the fourth claim, or parts of it, were manifestly unfounded and clearly abusive.

*Was there error in holding that the claim was clearly abusive?*[11]

[54] WK argued that the RPO was wrong to conclude that the fourth claim was clearly abusive. Submissions to that effect were misdirected. The question is whether the conclusion the RPO reached was reasonably open to him.

[55] The expression "clearly abusive" apparently has not been judicially defined. The critical enquiry is whether the claim is "abusive". The word "clearly" is part of the test, but it does not define the meaning of the word "abusive". The addition of

---

[11] The RPO's reasons for concluding that WK's claim was clearly abusive are recorded above at [42].

"clearly" indicates that the RPO must be satisfied that the abusive nature of the claim is clearly established.

[56] As to the meaning of "abusive" Ms Jerebine, referred to the opinion of the authors of *Immigration and Refugee Law*, where they said:[12]

> 'Abusive' in this sense means a claim which is lodged to prolong the appeal process, lengthening a claimant's stay in New Zealand in order to develop and advance other 'humanitarian issues' to strengthen the case.

[57] Because I did not receive argument on meaning, this is not a case in which a concluded opinion on meaning should be reached. However, I do consider that, while a claim as described in the quoted text could amount to an abusive claim, the word "abusive" should not be defined by reference to a set of circumstances. Caution is also needed with this suggested meaning because, although one of the reasons for lodging a claim may be to prolong the *legal* process (not just the appeal process), that may not make the claim abusive if, for example, there are other good reasons. I also incline to the view that it is unhelpful to seek to find synonyms for a word that is readily understood in applications to a court to strike out a proceeding as an abuse of process. All relevant factors need to be taken into account.

[58] I am satisfied that the RPO's decision was reasonably open to him. The reasons for his conclusion are stated fairly succinctly but, having regard to his decision as a whole, including the summary of the earlier claims and Tribunal decisions, and the review of the fourth claim as presented by WK, it is apparent that the RPO put his assessment into the full context and weighed relevant matters.

[59] The context of the fourth claim, which the RPO referred to in his reasons as the "immigration history", was assessed in relation to two more recent matters of consequence – the third Tribunal decision and the fact that WK had become liable for deportation. This part of the RPO's reasoning, as reasonably supporting the conclusion "when viewed in context", may be illustrated by providing a short chronology of events between 17 January and 21 March 2017:

---

[12] Doug Tennent, Katy Armstrong and Peter Moses *Immigration and Refugee Law* (3rd ed, LexisNexis, Wellington, 2017) at 394.

17 January: Third Tribunal hearing.

27 February: Third Tribunal decision.

6 March: Deportation notice sent to WK.

8 March: At 00:33 am WK sent an email to Ms Uca. This email was put in evidence by Ms Uca (together with her email in response noted next). It is unclear whether WK had received the deportation notice, issued on 6 March. In his email he said to Ms Uca: "Seems still no news from Tribunal. Do you think is that good? [sic]" WK then referred to the fact that there had been 89 views of his blog from Turkey and suggested that the Tribunal should be advised.

8 March: At 9:30 am Ms Uca replied to WK's email. She said she had received the Tribunal's decision and that it was "not good". She referred to the possibility of judicial review of the Tribunal decision and an application to the Minister of Immigration. She asked WK to see her.

21 March: The fourth claim, with reasonably detailed supporting documents, was lodged. There was no application for leave to appeal against, or judicially review, the third Tribunal decision.

*Was the RPO in error in holding that the claim repeated earlier claims?*

[60] There is a difference of judicial opinion as to the meaning and application of s 140(3)(b).

[61] In *AR v Refugee and Protection Officer*, Edwards J said:[13]

---

13 *AR v Refugee and Protection Officer* [2016] NZHC 2916.

> [50] There is no basis to draw a distinction between a claim that is merely repetitive and a claim that is repetitive in a manifestly abusive sense. This would add an unwarranted gloss to the words of the statute. The section is clear as to its terms. The focus in s 140(3)(b) is on the claim. *It requires a comparison of the first claim with the second claim to see whether it is essentially the same claim*. In some cases additional material may mean that the subsequent claim is not repetitive of the previous claim. But that is not the position in this case. …
>
> (emphasis added)

[62] In *E v Ministry of Business, Innovation and Employment*, Hinton J was of the opinion that the words in s 140(3)(b) apply "to a claim that is no more than an unmodified re-filing of a previous claim".[14] The Judge cited another decision of this Court, *BV v Immigration and Protection Tribunal*, as authority for that interpretation.[15] That citation appears to be an error, because *BV* did not address s 140(3) or otherwise provide authority for the proposition. Ms Jerebine noted that the statement appears to come from an opinion of the Tribunal in *AO (Afghanistan)*.[16]

[63] WK submitted that the "unmodified re-filing" approach is the correct approach. He further argued that Edwards J was wrong in stating that there is "no basis to draw a distinction between a claim that is merely repetitive and a claim that is repetitive in a manifestly abusive sense". In other words, WK argued that, as a matter of law, the repetition had to amount to clear abuse. He argued that "a claim that serves to further the [existing] account with new evidence" is neither abusive nor repetitive.

[64] I do not agree with those submissions. I do agree with Edwards J's analysis and with Ms Jerebine's submissions in support of that approach. It is an interpretation consistent with the purpose of the provision and with the clear meaning of the word "repeat" when read in context and, in particular, the fact that it is repetition of "any claim", including subsequent claims. As Ms Jerebine submitted, if the unmodified re-filing interpretation was correct, s 140(3)(b) would add nothing to the power in s 140(3)(a) to refuse to consider a claim that is clearly abusive.

---

14 *E v Ministry of Business, Innovation and Employment* [2016] NZHC 2599 at [39](a).
15 *BV v Immigration and Protection Tribunal* [2014] NZHC 283, [2014] NZAR 415.
16 *AO (Afghanistan)* [2015] NZIPT 800797 at [33].

Unmodified re-filing of a previous claim is a long established example of an abusive claim under various enactments, including the High Court Rules.

[65] The purpose of s 140(3)(b) may be seen in the context of the purpose of s 140 as a whole. As Ms Jerebine submitted:

> The function of s 140 is to give effect to New Zealand's obligations to allow for sur place claims under the Convention, which are claims based on circumstances or events that occur after a claimant has left their country of origin.[17] There are three broad types of sur place claims: (1) where there is a change in circumstances of the refugee's country of origin; (2) where there is an intensification of pre-existing factors since departure that increase the risk of persecution; and (3) where an individual's actions while abroad heighten an individual's risk of persecution.[18] Section 140(1) allows sur place claims to be considered (subject to a good faith test), while s 140(3) prevents abuse of this system. Section 140(3) is aimed at preventing an ongoing cycle of repeated, groundless claims to prolong a claimant's stay in New Zealand.[19]

[66] The RPO interpreted s 140(3)(b) in the manner outlined by Edwards J in *AR*. There was no error of law in that regard.

[67] I am also satisfied that there was no other reviewable error in the RPO's conclusion, in applying the correct standard, that the fourth claim repeated previous claims. For there to be reviewable error in relation to the RPO's application of the correct test, on the facts of this case, it was necessary for WK to establish that the RPO failed properly to identify the claim or claims in question. WK argued, for example, that his fourth claim about the additional number of views on his blog was a new claim, and that the information to Turkish police about WK's social media activities, amounted to a new claim. There was no reviewable error by the RPO. Some of the information amounted to evidence that was not advanced in earlier claims, but the claim which the RPO concluded was being repeated was a claim that

---

17 United Nations High Commissioner for Refugees *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, Geneva, 2011) at [94]-[96].

18 James C Hathaway and Michelle Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge, 2014) at 76.

19 See *Refugee Appeal No 75139* (19 November 2004) at [21] for the background to the introduction of the predecessor of s 140(3), s 129J of the Immigration Act 1987. The Authority commented "because experience had shown that second refugee claims had led to wide scale abuse, the provisions … narrowed the aperture for the submission of second (or subsequent) claims. See also Department of Labour "Briefing on the Department of Labour to the Transport and Industrial Relations Select Committee" at [825] on the current s 140 in the Immigration Bill 2007: "it is considered appropriate to limit the number of subsequent claims available to a non-citizen to prevent an ongoing cycle of claims".

WK was at risk of harm from the Turkish authorities because of his comments on social media. This was a repetition of WK's second and third claims.

[68] At the hearing of this application, WK sought to rely on information that had not been before the RPO about the number of views on his blog. And following the hearing, with the decision reserved, WK forwarded further information and submissions to the Court and asked that this be taken into account. The issues I have to determine are whether there was reviewable error by the RPO. As Venning J said in *D v Immigration and Protection Tribunal* "it obviously cannot be an error for the Tribunal to fail to take account of evidence that was not before it".[20] The same applies to a decision of an RPO. As also observed in that case, this Court, on an application for judicial review, "generally proceeds on the basis of evidence available to the decision-maker at the time of the decision".[21] There is no justification for taking account of the new information introduced at the hearing before me, or the further information tendered following the hearing.

[69] WK sought to support his application for review by arguing that the arrest of and charges against the pastor was a new event. A publication containing a lengthy article on the pastor's circumstances in Turkey was produced by WK. And this topic was given some emphasis in oral submissions. Matters relating to the pastor do not appear to have been advanced in support of the fourth claim.

[70] I am satisfied, for two reasons, that the submissions relating to the pastor do not provide grounds to set aside the RPO decision. The first is that the claim dealt with by the RPO was not supported by evidence relating to the pastor. The second is that the conclusions in the third Tribunal decision (that the pastor's arrest did not support WK's claim) cannot be challenged in this proceeding.

[71] WK had claimed, in his response to the RPO, that a Turkish interpreter in New Zealand (who had assisted with WK's first claim) had breached his confidentiality. The RPO found that this was a repetition of a claim made in the second claim. WK contended that the claim was not repetition of the earlier claim

---

20 *D v Immigration and Protection Tribunal* [2014] NZHC 3017 at [32].
21 At [24].

because he had subsequently learned that the interpreter had been "sacked" for failing to keep information confidential. This information does not indicate any reviewable error by the RPO in the decision now under review.

*Was there error in holding that the claim was manifestly unfounded?*

[72] There were two distinct "claims" in what I compendiously refer to as the "fourth claim". One was the principal claim, already addressed, of the fear of harm arising from the online activities. As already recorded, the RPO concluded that this claim was manifestly unfounded as well as repetition of the claims earlier made. The RPO held it to be manifestly unfounded because of the finding in the third Tribunal decision that the risk of WK's being investigated or arrested did not arise to the level of a real chance and, even if this did occur, the Tribunal did not consider "the consequences that would follow constitute serious harm".[22] The RPO was entitled to rely on those findings and expressly did so.[23]

[73] The second, discrete, claim by WK was that he would be identified by Turkish authorities from the publication online of the first and second Tribunal decisions. The Tribunal decisions were anonymised, as required by s 151(4) of the Act, and WK acknowledged they were anonymised. His claim that, despite this, he would be identified, and that this would in turn lead to his being seriously harmed on return to Turkey, was found by the RPO to be speculative and on that basis manifestly unfounded. There was no reviewable error in this conclusion. It is also to be noted that, as the applicant, WK was responsible for establishing his claim.[24]

***Was the decision unreasonable?***

[74] The merit of WK's contention that the RPO's decision was unreasonable turns, in large measure, on the standard of unreasonableness to be applied. WK submitted (and pleaded) that the decision ought to be reviewed in its entirety for reasonableness and that this required examination of the decision on the merits. He submitted that the approach of Whata J in *BZ (Sri Lanka) v Immigration and*

---

22 *AW (Turkey)*, above n 6, at [91]-[92].
23 Immigration Act 2009, s 141(2).
24 Section 135.

*Protection Tribunal* was authority for this approach.[25] That decision is not relevant. In that case the Judge was considering whether to allow further time to apply for leave to bring judicial review proceedings under ss 247 and 249(4) of the Act. For that purpose he examined the merits of the proposed application to satisfy himself that declining leave would not result in substantive unfairness.[26] The Judge made no findings about the standard or scope of unreasonableness.

[75] The standard of unreasonableness in immigration cases is, with one qualification, the *Wednesbury* standard.[27] The *Wednesbury* standard, applied in the present context, requires WK to satisfy the Court that the RPO decision is "not one that a reasonable [RPO] could arrive at, correctly applying the law to the facts which [he] found, and was entitled to find, on the evidence before [him]".[28]

[76] The qualification, noted by Ms Jerebine, is a different formulation by Palmer J in *Hu v Immigration and Protection Tribunal*.[29] The weight of authority is with the traditional *Wednesbury* formulation, but it is unnecessary in this case to review the different formulations. I agree with Ms Jerebine's submission that, on either formulation, the RPO's decision was not unreasonable.

[77] WK's submissions in support of this ground relied on submissions he had made in support of the preceding grounds and the underlying evidence he relied on. He argued that, taken together, his personal circumstances supported a conclusion that he qualified for refugee or protected person status and, therefore, the RPO's decision was unreasonable.

[78] WK's argument is not one directed to the reasonableness of the RPO's decision. The RPO's decision was not concerned with the substantive issue as to whether WK's claim for refugee and protected person status had been established. The RPO's decision was the decision refusing to consider the merits of the claim at all because of the conclusions under s 140(3). In light of my findings on the other

---

25 *BZ (Sri Lanka) v Immigration and Protection Tribunal* [2015] NZHC 2883.
26 At [39] and [55].
27 *Hussein v Deportation Review Tribunal* [2011] NZAR 441 (HC) at [17]-[18].
28 At [18], citing *R v Chief Executive, Department of Labour* HC Wellington CIV-2008-485-123, 10 June 2008 at [29].
29 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [29]-[31].

grounds for review, there is no basis for concluding that the decision was unreasonable.

***Was the decision-making process procedurally unfair?***

[79] This section is directed to the grounds earlier summarised as ground four and ground six. In summary, in respect of both grounds, WK argued that the RPO was wrong to say he lied in previous claims, that the RPO had decided against him because he was self-represented, that he was disadvantaged because he was not interviewed by the RPO on this claim and did not have legal representation for the claim, and the RPO was biased against him.

[80] The right to natural justice affords an applicant before the RPO a right to a decision that is procedurally fair. It includes a right to be free from bias, to be given a fair opportunity to be heard and to have legal representation, but these rights must be examined individually:[30]

> The content of the right to natural justice, however, is always contextual. The question is what form of procedure is necessary to achieve justice without frustrating the apparent purpose of the legislation.
>
> (footnote omitted)

[81] There is no merit in WK's claim that the RPO was biased. There is nothing in the decision itself suggesting the RPO did anything other than evaluate the claim under s 140 in an unbiased and objective way, and there is no other evidence to suggest otherwise.

[82] The claim that the RPO erred in stating that WK had lied in other claims must also be rejected. The RPO did not himself find that WK had been dishonest. He relied on credibility findings in previous Tribunal decisions as he was entitled to do as a matter of law.[31]

---

30 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120] per McGrath and Blanchard JJ.

31 Immigration Act 2009, s 141(2).

[83] WK's contention that he was disadvantaged by not receiving an interview must be assessed, first, in relation to provisions in the Act. The relevant provisions in the Act provide, in effect, that a decision may be made without a hearing. Section 136(2) provides that, in determining a claim, "the refugee and protection officer may seek information from any source, but is not obliged to seek any information, evidence, or submissions further to that provided by the claimant." Section 136(4) provides: "To avoid doubt, the refugee and protection officer may determine the claim on the basis only of the information, evidence, and submissions provided by the claimant concerned".

[84] There was no error of law by the RPO in the procedure he followed, but it is appropriate to scrutinise the RPO's approach with some care to determine whether there was procedural unfairness.

[85] It was open to the RPO to conduct an oral hearing, or at least interview WK. Whether his decision not to have a hearing, or conduct an interview, was a breach of natural justice must also be determined in light of the section under which the decision was made. Section 140(3) permits an officer to refuse to consider subsequent claims where either of the two limbs of that subsection are met. That is similar to a situation in which a court may, for example, determine it does not have jurisdiction. Such a determination does not necessarily require an oral hearing where the parties have been given notice of the issue to be decided.[32] That is not to say an oral hearing for claims considered under s 140(3) should never be given. But in this case WK was notified by the RPO's letter on 31 March 2017 that the RPO considered issues arose under s 140(3) of the Act. WK was given an opportunity to respond and did so. The RPO took into account WK's submissions in the response. In these circumstances, I am not persuaded that there was a breach of natural justice. Moreover, even if it is arguable that there should have been an oral hearing, or at least an interview, I would not be persuaded that the absence of a hearing, or interview, could justify setting aside the RPO's decision and requiring him to reconsider the fourth claim.

---

[32] *Gapuzan v The District Court at Christchurch* [2014] NZHC 870.

[86] WK said he had been told by Ms Uca that there would be an interview. In response to an enquiry from me, following the hearing, WK produced a copy of an email to him from Ms Uca, dated 31 March 2017, advising WK (amongst other things) that he would "soon be contacted by the RSB to be advised of an interview date". The evidence is admissible, but the absence of an interview, contrary to what Ms Uca was anticipating, does not alter my conclusion. I apprehend that Ms Uca may have anticipated there would be an interview because there had been an interview by the RPO who assessed the three earlier claims. But those were claims determined on their merits. In this case Ms Uca's advice was overtaken by the letter from the RPO to WK on 31 March 2017. That letter made clear that the issues the RPO wished to consider – being the issues under s 140 of the Act – would be determined on the papers, with WK being given the opportunity to make submissions in response, as I have earlier recorded.

[87] Whether WK was prejudiced by an absence of legal representation is similarly a contextual issue. As Ellis J observed in *Tauranga College Board of Trustees v International Education Appeal Authority*:[33]

> The question whether natural justice requires legal representation is context-specific, depending on the importance of the issues at stake and the nature and potential complexity of the hearing.

[88] For the following reasons I am satisfied that Ms Uca's withdrawal as counsel does not provide grounds for setting aside the RPO's decision on review:

(a) Ms Uca had provided material assistance to WK in the presentation of his claim. This included her own submission in support of the claim, anticipating the necessary review under s 140 of the Act, when she wrote in her covering letter: "We submit that [WK's] claim meets the jurisdictional threshold since it refers to events that took place after the decline of his IPT appeal."

---

[33] *Tauranga Boys College Board of Trustees v International Education Appeal Authority* [2016] NZHC 1381, [2016] NZAR 1029 at [115].

(b) The issue expressly identified by the RPO in his letter to WK of 31 March 2017 did not require submissions on complex points of law.

(c) WK was given an opportunity to present submissions, was given adequate time to do so, and submitted a six page written response.

(d) WK acknowledged in his response that Ms Uca had provided the RPO with a bundle of documents and said that he only wished to update the RPO with "some information".

(e) There is no evidence that WK was unable to put before the RPO any information that he wanted to put before him. No suggestion has been made that the RPO was not provided with all necessary information to make its decision.

[89] I am not persuaded that the process leading to the RPO's decision rejecting WK's fourth claim was procedurally unfair. The natural justice ground is also dismissed.

**Result**

[90] The application for judicial review is dismissed.

[91] The respondent advised that costs will be sought if the application is dismissed. If the respondent wishes to pursue that application, there are the following directions:

(a) A memorandum in support of the application for costs is to be filed and served by the respondent no later than 10 working days after the date of delivery of this judgment.

(b) Any response from or for WK is to made by memorandum to be filed and served within 20 working days after the date of delivery of this judgment.

(c) The memoranda are not to exceed five pages.

(d) The application for costs will be determined on the papers.

_____

Woodhouse J